85-875

Supreme Court, U.S.
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No. .....

In The
# Supreme Court of the United States
October Term, 1985

STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS,

*Petitioner,*

vs.

LUIGI MANOCCHIO,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF RHODE ISLAND

ARLENE VIOLET
Attorney General of the
State of Rhode Island

THOMAS MORE DICKINSON
Counsel of Record
Special Assistant
Attorney General
72 Pine Street
Providence, Rhode Island 02903
(401) 274-4400 Ext. 291

*Attorneys for the Petitioner*

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

## QUESTION PRESENTED FOR REVIEW

Whether the Rhode Island Supreme Court erred in holding that limitation of cross-examination regarding one aspect of the memory and perception of the prosecution's chief witness constituted *per se* reversible error pursuant to this Court's decision in *Davis v. Alaska*, 415 U.S. 308 (1974)?

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Now comes the State of Rhode Island and Providence Plantations, by its attorney, and prays that this Honorable Court issue a writ of certiorari to the Supreme Court of Rhode Island to review said court's erroneous decision of a federal constitutional question.

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## OPINION OF THE COURT BELOW

The case at bar was decided by the Rhode Island Supreme Court in a decision reported as *State v. Luigi Manocchio*, 496 A.2d 931 (R.I. 1985). The opinion is reprinted in full at pages 1 through 10 of the appendix hereto.

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## STATEMENT OF JURISDICTION

The judgment of the Supreme Court of Rhode Island entered on August 6, 1985. A petition to reargue was timely filed on August 9, 1985 and denied by the court in an order dated September 19, 1985. The petition to reargue is set out in full at pages 11 through 18 of the appendix hereto. The order denying reargument is set out at appendix page 19.

Jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. § 1257(3) and by the Rules of the Supreme Court of the United States R. 17.1(b)(c).

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## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent portions of the following statutory and constitutional provisions involved in this case are set out beginning at page 20 of the appendix hereto:

U.S. Const. Amend. VI;

U.S. Const. Amend. XIV, § 1;

R.I. Const. Art. I, § 10

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## STATEMENT OF THE CASE

This case involves a gangland-style murder that occurred in the City of Providence, Rhode Island, on April 20, 1968. The victims were Rudolph Marfeo and Anthony Melei. Marfeo was allegedly killed for interfering with the underground gambling operation of Raymond L.S. Patriarca. Patriarca, Maurice "Pro" Lerner, and three other co-conspirators were convicted in 1969. *See State v. Patriarca*, 112 R.I. 14, 308 A.2d 300 (1973); *State v. Lerner*, 112 R.I. 62, 308 A.2d 324 (1973). Luigi Manocchio, Respondent herein, absented himself from the jurisdiction for some ten years and was therefore unavailable for trial. *State v. Manocchio*, 448 A.2d 761, 763 (R.I. 1982). He was eventually tried and convicted by a Providence County Superior Court jury of one count of conspiracy to murder and two counts of accessory to murder.

Manocchio appealed his conviction to the Rhode Island Supreme Court. That court reversed the conviction, holding that the trial justice had impermissibly limited cross-

examination of the state's principal witness. The state court's opinion is set out at pages 1-10 of petitioner's appendix.

1. *Factual Background* The principal prosecution witness in this case was John "Red" Kelley. Mr. Kelley testified that he had assisted Manocchio and the other defendants in planning the murders of Marfeo and Melei. Manocchio and his confederates knew that Marfeo and Melei did their weekly shopping at Panone's Market on Pocasset Avenue in Providence. Kelley was from Massachusetts and was not a familiar figure in the Providence neighborhood. He was therefore chosen to "case" the market and to prepare an escape route for the gunmen.

Kelley testified regarding several meetings that took place in preparation for the killings. Kelley's testimony was extensive and detailed. He admitted that at prior related trials he had told lies. The trial record is replete with statements by Kelley that he could not recollect certain points. In addition, his status as a government-supported informant was placed before the jury. Despite the obvious frailties of this witness, the core of Kelley's revelations regarding Manocchio's guilt could not be shaken. Kelley offered a coherent and consistent account of the planning, preparation and execution of the Marfeo-Melei murders. This testimony linked Manocchio inextricably to the murders, resulting in verdicts of guilty on all charges.

2. *Facts regarding cross-examination.* During a pretrial voir dire, witness Kelley stated that he had been diagnosed as having "premature Alzheimer's disease." Later at the trial, defense counsel attempted on cross-examination of witness Kelley to explore this issue. The trial jus-

tice sustained the prosecutor's objections to questions regarding Alzheimer's disease. On appeal, the Rhode Island Supreme Court concluded that this limitation of cross-examination violated Manocchio's Sixth Amendment right of confrontation. The State argued first that as a lay witness, Kelley was clearly not competent to provide the jury with an explanation of the nature or effects of Alzheimer's disease. Even assuming that Kelley could properly recount the diagnosis, he could provide the jury with no substantive assistance in measuring his perception or memory. Moreover, the State argued, defendant at trial had ample opportunity to expose Kelley's myriad weaknesses to the jury. Kelley's trial testimony is replete with demonstrations that his memory was flawed. By observing the witness and by listening to his repeated assertions of absence of memory, the jury was fully able to recognize that this witness had a recollection problem. Despite these flaws, the jury chose to believe this witness. Merely attaching a scientific moniker—without expert or diagnostic testimony—to the problem could scarcely assist the jury in evaluating the witness.

In sum, the State argued that the limitation on cross-examination—if erroneous—resulted in no prejudice to defendant. The Rhode Island Supreme Court rejected the State's argument. The court chose instead to apply a rule of *per se* reversal, purportedly based upon this Court's decision in *Davis v. Alaska*, 415 U.S. 308 (1974). The Petitioner submits that the application of a *per se* reversal rule, on the facts of this case, constitutes error of constitutional magnitude requiring reversal by this Court. Petitioner further submits that the issues in this case are similar to those presented in *Delaware v. van Arsdall*, No.

84-1279 (U.S. cert. granted July 2, 1985). Petitioner accordingly prays for a writ of certiorari to the Rhode Island Supreme Court to review that court's judgment.

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## ARGUMENT

Petitioner submits that the Rhode Island Supreme Court erred in applying a *per se* reversal rule based upon *Davis v. Alaska*, 415 U.S. 308 (1974). Instead, Petitioner submits, the court should have reviewed the trial record in its entirety to determine whether, on the totality of the circumstances, the defendant received a fair trial. Moreover, this Court has already granted certiorari to review application of the *per se* error rule in *Delaware v. Van Arsdall*, No. 84-1279 (U.S. cert-granted July 2, 1985). Petitioner submits that the decision of that case will likely be controlling.[1] Accordingly, certiorari in this case should be granted in order to apply this court's decision in *van Arsdall* to the instant case.

### THE RHODE ISLAND SUPREME COURT ERRED IN APPLYING A PER SE ERROR RULE UNDER DAVIS v. ALASKA.

In reversing Manocchio's conviction, the Rhode Island Supreme Court applied a *per se* rule of reversal. Pet. App.

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[1] In determining whether to Petition for Certiorari in this case, Petitioner reviewed the briefs filed in *van Arsdall*. There are marked similarities between the issues involved in *van Arsdall* and the instant petition. Petitioner respectfully addresses this Court's particular attention to the brief filed on behalf of the United States as Amicus Curiae in *van Arsdall*. The United States has presented a cogent and well-reasoned argument in favor of requiring a prejudice analysis in cases such as the one at bar.

at 7. The Rhode Island court purported to derive this rule from the decision of this Court in *Davis v. Alaska*, 415 U.S. 308 (1974).[2] In *Davis* a state trial judge had precluded a defendant from cross-examining a prosecution witness with regard to the witness' prior record of juvenile convictions. Although recognizing the state's significant interest in the confidentiality of juvenile court records, this Court gave superior importance to the defendant's right to confront his accusers as guaranteed by the Sixth Amendment. This right of confrontation, the Court reasoned in *Davis*, includes within it the right to conduct an effective cross-examination. In recognizing the significance of cross-examination as a component of the defendant's Sixth Amendment right, this Court stated:

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[2] The Rhode Island Supreme Court held that the limitation of cross-examination in this case violated the Sixth Amendment as well as Article I, Section 10, of the Rhode Island Constitution. Pet. App. 6. In reaching this result, the court declined to base its holding on an adequate and independent state law footing. *Cf State v. von Bulow*, 475 A.2d 995 (1984), *cert. denied*, 105 S.Ct. 233 (1984) (announcing adequate and independent state law basis for limitation upon warrantless searches and seizures). Instead, the court in *Manocchio* noted that the state and federal constitutional provisions involved in the instant case are identical. *State v. Manocchio*, Pet. App. 6 n. 2. In its analysis of the confrontation clause issues, the court demonstrated that the state and federal issues involved are closely interwoven. Thus, pursuant to this Court's holding in *Michigan v. Long*, 103 S.Ct. 3469 (1983), it is readily apparent that the decision of the Rhode Island Supreme Court in the instant case rested primarily on federal law. As this Court stated in *Long*:

> "[W]hen . . . a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so." *Id.* at 3476

> Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witnesses' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, i.e. discredit, the witness.

415 U.S. at 316. This Court characterized the limitation in *Davis* as "constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." *Id.* at 355 (quoting *Brookhart v. Janis*, 384 U.S. 1, 3 (1966)). Thus, this Court in *Davis* concluded that a new trial—free of impermissible limitation upon the scope of cross-examination—was the only remedy capable of repairing the harm to the defendant's confrontation rights.

Based largely upon the reasoning in *Davis*, the Supreme Court of Rhode Island has fashioned a *per se* error doctrine that it applies whenever a trial judge impermissibly limits a defendant's cross-examination of a prosecution witness. *State v. DeBarros*, 441 A.2d 549 (1982); *State v. Freeman*, 473 A.2d 1149 (1984). The *per se* error doctrine derives from the Rhode Island Supreme Court's understanding of the Sixth Amendment confrontation clause. The court perceives cross-examination to be the most important means of effectuating a defendant's right to confront his accusers. Any limitation upon cross-examination therefore is deemed a *per se* violation of the Sixth Amendment, mandating reversal without regard to other circumstances of the trial.

The Petitioner submits that the *per se* error doctrine constitutes an erroneous extension of this Court's decision

in *Davis*. Confrontation and cross-examination are concededly important rights. Nevertheless, Petitioner submits that even in situations where a trial judge has imposed limitations upon cross-examination a proper interpretation of the Sixth Amendment requires an analysis of the totality of the circumstances to determine whether the defendant received a constitutionally fair trial. This approach—which focuses upon the trial as a whole and not merely upon one narrow dimension—comports with the analysis utilized by this Court in analogous cases involving related Sixth Amendment issues. For example, in *United States v. Agurs*, 427 U.S. 97 (1976), this Court considered whether the failure of the prosecutor to deliver unrequested materials to the defense counsel deprived the defendant of a fair trial. The information was arguably exculpatory within the scope of *Brady v. Maryland*, 373 U.S. 83 (1963). The Court held that in reviewing such a problem, the proper approach is to determine whether the non-disclosed evidence was material to the case. The Court's analysis clearly entails a review of the entire record:

> "It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be *evaluated in the context of the entire record*. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt." *Id.* at 112-13 (emphasis added).

Applying this standard in *Agurs*, the Court found that the withheld evidence was not sufficiently material to defendant's case to warrant a new trial. More recently, in

*United States v. Bagley*, 105 S. Ct. 3375 (1985), this Court utilized a totality of the circumstances approach in the context of cross-examination. The prosecution in *Bagley* had withheld information that could have been used to impeach its witnesses. Although recognizing the importance of cross-examination, this Court held that the limitation upon cross-examination that resulted from the non-disclosure did not deprive the defendant of a fair trial. In reaching this conclusion the Court applied a totality of the circumstances approach and determined that the withholding of materials —and the resultant effect upon cross-examination—did not "undermine[ ] confidence in the outcome of the trial." *Id.* at 3381.

This term this Court confronts two cases involving the *per se* reversal rule. The Court has already decided *Delaware v. Fensterer*, No. 85-214 (U.S. Nov. 4, 1985). *Fensterer* is extremely similar to the case at bar. In *Fensterer*, the prosecution offered testimony from an expert witness who was incapable of remembering the basis for his opinion. The defendant argued that such a witness was incapable of cross-examination and should therefore have been precluded from testifying. This Court rejected defendant's argument. The Court noted that any limitation on defendant's cross-examination resulted not from any Court ruling but from the defect in the witness' memory. Moreover, the Court reasoned that the witness' failure of memory was plainly revealed to the jury. This factor alone constituted fertile ground for a defense attack upon the witness' opinion:

> Quite obviously, an expert witness who cannot recall the basis for his opinion invites the jury to find that his opinion is as unreliable as his memory.

*Id.*, 38 Crim. L. Rptr. at 4068. The jury in *Fensterer* could clearly observe the witness and his failure of memory. Any harm to defendant's cross-examination was therefore expiated by the weaknesses revealed in the witness' very demeanor. In summarizing the law in this area, the Court stated:

> The Confrontation Clause includes no guarantee that every witness called by the prosecution will refrain from giving testimony that is marred by forgetfulness, confusion, or evasion. To the contrary, the Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose these infirmities through cross-examination, thereby calling to the attention of the fact finder the reasons for giving scant weight to the witness' testimony.

*Id.* at 4069.

In the instant case, as in *Fensterer*, the jury was fully aware that witness Kelley suffered from a lapse of memory. A review of the trial transcript in this case reveals that Kelley responded to literally dozens of questions with statements indicating a failure of recollection. Thus, it was readily apparent to the jury—and to anyone who examined the trial transcript in its totality—that Kelley suffered a memory problem. The exact nature of the problem was never revealed to the jury. As the Petitioner argued to the Rhode Island Supreme Court, defendant sought to introduce through Kelley a medical diagnosis of Alzheimer's Disease. Under ordinary evidentiary rules it would have been erroneous to permit Kelley—a lay wit-

ness—to testify to the nature and cause of the disease.[3] Thus, the very most that the defense could have obtained through this witness was a hearsay statement that a physician had diagnosed him as suffering from the disease.

Given the substantial evidence on the record that the witness had a memory problem, it can scarcely be contended that this marginal piece of excluded information could have effected the jury. Yet, the Rhode Island Supreme Court declined to review the record in its entirety. Instead, the Court applied the *per se* reversal rule. This Court will confront this precise issue later this term in *Delaware v. van Arsdall*, No. 84-1279 (U.S. cert. granted July 2, 1985). This Court will consider whether an erroneous restriction of cross-examination requires automatic reversal without reference to whether the defendant was actually prejudiced by the error. The outcome of *van Arsdall* will likely be controlling of the instant Petition. This fact alone weighs heavily in favor of certiorari in this case. The application of a *per se* reversal rule to the facts of the instant case defies logic and conflicts with a reasoned review of the record in its entirety. This Court should therefore grant certiorari to review the judgment of the Rhode Island Supreme Court.

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[3] The Rhode Island Supreme Court, for example, has specifically held that testimony regarding medical diagnoses and conditions should normally come only from a qualified expert who can testify to a reasonable degree of medical certainty. *E.g., State v. Adams*, 481 A.2d 718 (R.I. 1984); *State v. Bowden*, 473 A.2d 275 (R.I. 1984). There is nothing in the record to suggest that Kelley was qualified to testify regarding an Alzheimer diagnosis. It is therefore difficult to comprehend how defense counsel could have intended to introduce such evidence through this witness. The Rhode Island Supreme Court seems, however, to have based its decision largely upon the premise that this witness could have offered detailed testimony regarding the diagnosis. Petitioner is unable to offer any rational explanation for this unwarranted presumption.

## CONCLUSION

The Rhode Island Supreme Court erred in applying a *per se* reversal rule in the instant case. Petitioner submits that this Court should therefore issue a writ of certiorari to review the Rhode Island Court's judgment. Alternatively, Petitioner prays that disposition of the instant petition be held in abeyance until such time as this Court decides *Delaware v. van Arsdall*, No. 84-1279, which case Petitioner submits, is likely to be controlling of the instant petition.

Respectfully submitted,

ARLENE VIOLET
Attorney General of the
State of Rhode Island

THOMAS MORE DICKINSON
Counsel of Record
Special Assistant
Attorney General

72 Pine Street
Providence, Rhode Island 02903
(401) 274-4400 Ext. 291

*Attorneys for the Petitioner*

August 6, 1985

Supreme Court
No. 84-43-C.A.

State

v.

Luigi Manocchio.

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August 6, 1985

Supreme Court
No. 84-43-C.A.

State

v.

Luigi Manocchio.

O P I N I O N

KELLEHER, J. On April 20, 1968, Rudolph Marfeo and Anthony Melei were shot to death while shopping at a Pocasset Avenue market in Providence. This appeal rep-

resents yet another chapter in the lengthy and persistent effort to bring those responsible for these murders to trial.[1] Defendant Luigi Manocchio (Manocchio) was indicted in August of 1969 on two charges of accessory before the fact and one charge of conspiracy to commit murder. He evaded arraignment and prosecution for ten years by fleeing the jurisdiction. *State v. Manocchio*, R.I. , , 448 A.2d 761, 763 (1982). Manocchio was finally arraigned on July 6, 1979, and in June of 1983 a Superior Court jury found him guilty of all three charges. Manocchio now appeals his convictions on a multitude of grounds. We reverse because we have determined that the trial justice impermissibly limited Manocchio's cross-examination of a key witness.

Melei and Marfeo were killed by two masked gunmen, allegedly in retaliation for running a gambling operation that competed with a similar enterprise run by another defendant, Raymond L. S. Patriarca (Patriarca). The state's case against all of the original defendants, including Manocchio, was based almost entirely on the testimony of participant-turned-informer John J. "Red" Kelley (Kelley). Before the grand jury that indicted the defen-

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[1] Originally, seven persons were indicted for activities connected with these murders (indictments numbered 69-767, -768, and -769 returned on August 14, 1969). In the three trials preceding this defendant's arraignment, Maurice Lerner was found guilty of first-degree murder and conspiracy to commit murder. John Rossi, Robert Fairbrothers, Raymond Patriarca, and Rudolph Sciarra were also found guilty of conspiracy but not guilty of charges of accessory before the fact. The conspiracy charge against Frank Vendituoli was dismissed, and he was found not guilty of accessory charges. *See State v. Lerner*, 112 R.I. 62, 308 A.2d 324 (1973), and *State v. Patriarca*, 112 R.I. 14, 308 A.2d 300 (1973).

dants, and again at the various trials of the various defendants, Kelley detailed a series of meetings with the other participants in the crime designed to firm up plans for the murder itself and for the subsequent getaway. Kelley's own avowed role in the crime involved reconnaissance, purchasing masks for the gunmen, preparing weapons, and planning an escape route.

At the time of Manocchio's trial, Kelley was sixty-eight years old, testifying about events that had occurred fifteen years previously. Defense counsel was therefore understandably concerned about Kelley's present ability to remember and relate accurately the circumstances surrounding Manocchio's alleged involvement in the two murders. Counsel's apprehension grew when Kelley testified in the following fashion at an identification-suppression hearing:

> "Q. Mr. Leppo [defense counsel:] Are you suffering from any disease that affects your memory?
>
> "A. Yes. Yes. [ Witness starts to cry.]
>
> " * * *
>
> "Q. Would you tell us what disease you have that affects your mind and memory?
>
> "A. I have — I'm, I'm being treated for many different things, and premature Alzheimer's, I think it is.
>
> "Q. And does that affect your memory, sir?
>
> "A. Yes, it does.
>
> "Q. And does that affect your thought process?
>
> " * * *
>
> "A. It does.
>
> " * * *
>
> "Q. Has that affected your recall as to certain events?

"A. It does affect it, yes.

"Q. And how often does this happen?

"A. When I tell you I can't remember a thing, it's an honest answer."

At the conclusion of the suppression hearing, Manocchio moved to have Kelley examined for competency. The trial justice stated: "[W]e heard him testify. The Court rules as a matter of fact, after hearing this gentleman testify, he is competent.

Subsequently, at trial, Manocchio sought to explore Kelley's memory problems and mental diseases for the benefit of the jury. Each time counsel broached this subject, however, he found inquiry foreclosed when the trial justice sustained the prosecutor's objections.

"Q. [Mr. Leppo:] Now, yesterday you told us you were taken to the House of Corrections in New Bedford. Do you remember saying that yesterday?

"A. [Kelley:] I don't recollect that.

"Q. You don't recollect saying New Bedford yesterday?

"A. I don't recollect now.

"Q. Do you have a problem with your memory?

"A. Yes, I do have a problem with my memory.

"Q. And the problem with your memory is that you cannot remember saying Thursday what you said on a Wednesday, sir?

MR. LEACH [the prosecutor:] Objection, Your Honor.

THE COURT: Sustained.

"Q. Do you have a problem with your memory you cannot remember what you said to me two questions ago?

"A. Yes, I do.

"Q. So that if I were to ask you to repeat your answer as to where you went with Mr. Rico, you would have forgotten that answer?

MR. LEACH: Objection, Your Honor.

THE COURT: You may answer.

"A. That's a possibility.

"Q. So that you have difficulty with that memory?

"A. I do.

"Q. And that memory, sir, has been failing you for some period of time now, is that correct?

MR. LEACH: Objection, Your Honor.

THE COURT: Sustained.

"Q. Has that memory been failing you?

MR. LEACH: Objection, Your Honor.

THE COURT: Sustained.

"Q. How long have you suffered from that condition, Mr. Kelley?

MR. LEACH: Objection, Your Honor.

THE COURT: Sustained."

Thus, the only evidence Manocchio was allowed to place before the jury regarding Kelley's mental condition was that Kelley had a "problem" with his memory. Kelley's premature Alzheimer's disease and the "many different things" for which he had previously revealed he was being treated were never revealed to the jury. Manocchio's quandry was compounded by Kelley's only recently abandoned participation in the federal witness-protection program. Kelley had been given a new identity through the program and had been relocated to an undisclosed area. Thus,

Manocchio's only hope for acquiring information about Kelley was through the use of cross-examination.

At the conclusion of the evidence, the jury returned verdicts of guilty on all three charges. The trial justice sentenced Manocchio to a life sentence on each of the accessory counts and a term of ten years on the conspiracy count, all sentences to be served consecutively.

On appeal Manocchio raises several issues relating to alleged errors before the grand jury and at trial. We find it unnecessary, however, to inquire further than the trial justice's unwarranted restriction of defense counsel's cross-examination of Kelley on the issue of Kelley's memory deficiences and mental diseases. Manocchio argues that by so limiting his ability to cross-examine Kelley, the trial justice denied Manocchio the right to confront his accusers guaranteed by both the Sixth Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment and article I, section 10, of the Rhode Island Constitution. We agree.

The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him * * *."[2] Included within the rights conferred by the confrontation clause is, primarily, the right of cross-examination. *Davis v. Alaska*, 415 U.S. 308, 315-16, 94 S. Ct. 1105, 1110, 39 L. Ed. 2d 347, 353 (1974); *Douglas v. Alabama*, 380 U.S. 415, 418, 85 S. Ct. 1074, 1076, 13 L. Ed. 2d 934, 937 (1965). In *State v. Anthony*, R.I. , , 422 A.2d

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[2] In pertinent part the Rhode Island constitutional provision is identical.

921, 924 (1980), we observed: "It is the essence of a fair trial that reasonable latitude be given the cross-examiner." While it is true that the trial justice must exercise his or her discretion to protect a witness from questions that "harass, annoy, or humiliate the witness, or questions that are irrelevant or offer no probative value," *id.*, we have clearly endorsed the principle that this discretionary authority to limit cross-examination "comes into play [only] after there has been permitted as a matter of right sufficient cross-examination to satisfy the Sixth Amendment." *State v. DeBarros*, R.I. , 441 A.2d 549, 552 (1982) (quoting *Springer v. United States*, 388 A.2d 846, 855 (D.C. App. 1978)).

Thus, in *DeBarros* and *State v. Freeman*, R.I. , 473 A.2d 1149 (1984), we clearly established a per se error rule where the defendant has been fully precluded from effective cross-examination on a pertinent issue. We have also relied on the per se standard where a defendant has been permitted to ask preliminary questions but has been otherwise functionally precluded from constitutionally adequate cross-examination. *State v. Parillo*, R.I. , 480 A.2d 1349, 1357 (1984). In *Freeman* defense counsel was blocked on cross-examination from eliciting from the only eyewitness to the victim's murder that at the time she gave a statement to police concerning the murder, she was in custody and under arrest. We held that because the witness's credibility

> "was the vital element in establishing the defendant's guilt, the trial justice, by totally precluding the defendant from raising and probing the issues of motive, bias, or prejudice, effectively cut off the defendant's

right to test [the witness's] credibility fully and adequately." *State v. Freeman*, R.I. at , 473 A.2d at 1154.

In *Parillo* defense counsel sought to cross-examine the sole living eyewitness to the victims' murders about a deal she allegedly made with the police in exchange for her testimony. Defense counsel was allowed to ask several preliminary questions but was then foreclosed from further substantive inquiry. We held that a defendant must be afforded "not just some cross-examination, but *sufficient* cross-examination as a matter of right." (Emphasis in original.) *State v. Parillo*, R.I. , 480 A.2d at 1359. We thus applied the per se error standard and vacated the defendant's conviction even though counsel had not been completely foreclosed from inquiry.

With these cases for guidance, we find ourselves in sharp disagreement with the state's assertion that the few preliminary questions permitted by the trial justice sufficiently apprised the jury of the state of Kelley's mental faculties. At best, we believe these questions served merely to pique the jury's curiosity, providing no basis from which to infer the nature or extent of Kelley's "problem with [his] memory." We are persuaded that the four questions posed by defense counsel and answered by Kelley do not satisfy the constitutional requirements for adequate cross-examination.

While it is true that the case presently before us does not involve the traditional impeachment areas of motive or bias, we have concluded that the rationale supporting our holdings in those cases is equally compelling with respect to cross-examination aimed at exploring competency. We have pointed out the the purpose of cross-examination

is to test for the benefit of the jury "the credibility of the witness and the truthfulness of his [or her] testimony * * *." *State v. Anthony*, R.I. at , 422 A.2d at 924. It is axiomatic that the ability of a witness to remember accurately and to relate the events in question is of crucial importance to a jury's assessment of that witness's credibility. Where counsel is able to demonstrate that through either passage of time or an intervening mental disease the witness is incapable of recollecting the events in question, or of distinguishing fact from fiction, the most essential element of the witness's value and reliability has been destroyed.

In the case presently before us, an exploration of Kelley's possible memory defects was especially warranted. When Kelley took the witness stand before the jury that convicted Manocchio, he was the only witness who could link Manocchio with the fifteen-year-old murders of Melei and Marfeo. It is readily apparent to us that Kelley's credibility was the only real issue before the jury. As the state's only witness with the ability to detail Manocchio's participation in the murders, the jury's determination of whether or not to convict him rested entirely upon its assessment of Kelley's competency and veracity.

In addition, this was at least the fourth time since the murders had occurred that Kelley had been required to relate his story under oath,[3] admitting for the first time on the eve of Manocchio's trial that all of his prior testimony had been tainted in significant respects with perjury.

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[3] Kelley testified before the grand jury that returned these indictments and at the three previous trials of the other defendants.

There was an obvious danger here that Kelley's testimony involved far more recitation than recollection.

For these reasons we find in line with our prior case law that the trial justice's limitation of cross-examination on the issue of Kelley's memory deficiences and mental diseases was clear error, violating both Manocchio's Sixth Amendment right to confront the witnesses against him and art. I, sec. 10, of the Rhode Island Constitution.

Manocchio's appeal is granted, and the judgments of conviction appealed from are vacated. The papers in this case are remanded to the Superior Court for a new trial on all counts.

The Chief Justice participated in the oral argument and in the decision of the court, but he did not participate in the publication of the formal opinion.

STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS
PROVIDENCE, SC.

SUPREME COURT

No. 83-0043-C.A.

STATE OF RHODE ISLAND

vs.

LUIGI MANOCCHIO

MEMORANDUM IN SUPPORT OF
STATE'S PETITION TO REARGUE (R. 25)

This case was decided by the court on August 6, 1985. The Defendant's appeal was sustained and the court ordered the case remanded to Superior Court for a new trial. The State has filed a Petition to Reargue the instant case. The State recognizes that in seeking reargument a party is required to demonstrate that the court has overlooked or misapprehended some issue that was properly raised. As this court stated in *Brimbau v. Ausdale*, 120 R.I. 670, 389 A.2d 1254 (1978):

> The Supreme Court may at its discretion reexamine its own decision within a reasonable time after rendition . . . The purpose of reargument is to afford a petitioner an opportunity to point out matters presented in the briefs and relied upon in the original argument which he believes were overlooked or misapprehended by the appellate court in reviewing the case . . ." 389 A.2d at 1255.

The State recognizes that, as the petitioner in this instance, the State bears the burden of demonstrating error in this Court's opinion. *See Lapierre v. Greenwood*, 85 R.I. 484, 135, A. 2d 269 (1957); *see generally* J. Weisberger,

*Rhode Island Appellate Practice* § 25.1 (1985). The State respectfully submits, that in the instant case, this court's decision simply fails to address one point of major significance that was central to the State's argument. Moreover, the State submits that the so-called per se reversal rule should be reexamined at this time. Finally, the State submits that the interests of justice demand that this court address several issues that were raised by the parties but not treated in the opinion.

I. *This Court Overlooked the State's Argument.*

This court granted defendant's appeal in the instant case based upon the defendant's argument that the trial justice had impermissibly limited the scope of cross examination of the State's lead witness. The State recognizes that the trial justice sustained several of the prosecutor's objections to questions regarding the witness' memory condition. There was some indication that this witness, John Kelley, was suffering from Alzheimer's disease. Defense counsel sought, upon cross-examination of the witness, to establish the basis for the witness' difficulty with his memory. The State addressed this point at length at the oral argument of this case. The State pointed out that this witness was a lay witness. Even if the trial justice should have permitted him to recount his diagnosis—an assumption which the State in no way concedes—the witness certainly could not have described in any detail the

apparently complex medical and mental ramification of such a diagnosis.[1] Thus, the magnitude of the limitation placed upon defense counsel was not as great as this court's opinion appears to suggest.

Moreover, a review of the record demonstrates that defense counsel had ample opportunity to attack the memory of this witness. The State suggested at oral argument that the defendant was attempting to draw the inference that this witness had a faulty memory. The so-called "Alzheimer" issue was not an essential tool to this strategy. As the State pointed out, a review of the transcript clearly revealed that this witness had memory problems. This court dismissed the State's argument with the following reference:

> "[W]e find ourselves in sharp disagreement with the state's assertion that the few preliminary questions permitted by the trial justice sufficiently apprised the jury of the state of Kelley's mental faculties. At best, we believe these questions served merely to pique the jury's curiosity, providing no basis from which to infer the nature and extent of Kelley's 'problems with [his] memory.'" Id., slip op at 8.

The lapse in this reasoning is that it ignores the substantial volume of testimony in the case.

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[1] This court has held that testimony regarding medical diagnoses and conditions should normally only come from a qualified expert who can testify to a reasonable degree of medical certainty. *See State v. Adams*, 481 A.2d 718 (R.I. 1984); *State v. Bowden*, 473 A.2d 275 (R.I. 1984). There is no reason to suggest that witness Kelley was qualified to testify regarding an Alzheimer diagnosis. In light of this fact, it is difficult to comprehend how defense counsel could have hoped to introduce this information through this witness. It would appear, however, that the court's decision rests largely on this premise.

The State concedes that a mere cursory view of the evidence in this case might support the court's conclusion that defense counsel had no adequate basis for attacking Kelley's memory. This is precisely the reason for the State's repeated insistence at oral argument that the court undertake a careful reading of the transcript in this case. With all due respect, the State suggests that the court should re-examine this transcript before disposing of the instant petition. Such a reading will reveal that Kelley's own testimony was riddled with failures of memory and lapses of recollection. On literally scores of occasions Kelley responded to questions by saying that he could not remember or that his recollection was weak. (Tr. 1015-17, 1203, 1264, 1323-56).

Remarkably, this court's analysis in the August 6 opinion focuses on only four questions that were posed by defense counsel. Yet the jury that sat in this case heard this witness complain of his memory failure on dozens of occasions. The State does not often draw attention to the weaknesses of its own witnesses. These weaknessses, however, were obvious to the jury. On such a record, the State submits that defense counsel had ample ammunition for h's attack upon Kelley's memory. Despite these flaws—which were clearly revealed to the jury—the factfinder in this case chose to believe John Kelley's testimony. Consequently, this court should reconsider this case to determine whether a new trial is necessary.

II. *The Per Se Reversal Rule Should not have been Applied.*

In sustaining the instant appeal, this court relied upon the so-called "per se error" rule as described in *State v. DeBarros*, 441 A.2d 549 (R.I. 1982). The State respectfully suggests that application of that rule in the instant case was improper. As has been demonstrated in the foregoing section of this memorandum, the defendant had ample opportunity to attack the recollection of witness Kelley. This witness' memory problems were readily apparent to the jury. This court has recognized that limitations on cross-examination, even if erroneous—will be deemed cured if the defense attorney is permitted to obtain the desired information during the course of his examination. *See State v. Soto*, 477 A.2d 945 (R.I. 1984). Because the examination provided an ample basis for defendant to challenge this witness' memory, application of the per se rule is simply inappropriate.

Even if this case came within the perimeters of the per se error rule, the State respectfully suggests that this court should seriously consider abandoning the rule. The rule apparently derives from the decision of the United States Supreme Court in the celebrated case of *Davis v. Alaska*, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974). The United States Supreme Court has recently implied that the rule of *Davis* is not quite so broad as originally thought. *Cf United States v. Bagley*, 105 S. Ct. 3375, 3381 (1985) (lower court erred by invoking "automatic reversal" rule where effects upon cross-examination did not deprive defendant of fair trial). Indeed, the United States Supreme Court has recently granted cer-

tiorari to determine whether the "automatic reversal" rule of Davis should be abandoned entirely. *Van Arsdall v. State*, 486 A.2d 1 (Del. 1984), *cert. granted*, 105 S. Ct. 3552 (1985). In *Van Arsdall* the Justices will consider whether the Delaware Supreme Court improperly applied a per se reversal rule. The lower court in *Van Arsdall* held that limitation of cross-examination in the area of bias necessitates reversal on a per se basis. The United States Supreme Court has accepted review of the *Van Arsdall* case to determine whether this per se rule was proper.

Certiorari in *Van Arsdall* was granted on July 2, 1985. 105 S. Ct. 3552. It is likely that the case will be argued in the United States Supreme Court in January of 1986. The State respectfully suggests that there is an extremely high probability that the Supreme Court will reject the per se error rule applied by the Delaware Supreme Court. In view of this probability, it would seem appropriate for this court at this time to review the viability of the per se error rule as applied in this case.

III. *This Court Should Address Other Issues.*

This case involved many issues that were carefully briefed and argued by the parties. In particular, the parties addressed one issue involving alleged perjury before the grand jury and a separate issue concerning the alleged disappearance of physical evidence. These issues were carefully briefed and argued by the parties in this appeal. Moreover, they are of a nature that they are likely to arise at a retrial of this case. The State recognizes that his Court considered one issue dispositive of the within appeal. Nevertheless, the State respectfully suggests that

the interests of justice require this Court to address these additional issues at this time.

This court has previously recognized that non-dispositive issues should be treated on appeal when the issues are likely to arise on retrial. *See, e.g. State v. Lemon*, 256 A.2d 261, 264 (R.I. 1983) (when new trial granted, court may discuss other non-dispositive issues that are likely to arise again); *State v. Beulieu*, 116 R.I. 575, 359 A.2d 692 (1976) (non-dispositive issues will be discussed by court in cases where new trial has been ordered and issues may arise in future).

Only this term, in *State v. Heredia*, 493 A.2d 831 (1985), this Court reiterated its practice of addressing a non-dispositive issue that "would be required in order to provide guidance for a new trial." *Id. Heredia* is most instructive. In that case the court found a discovery issue to be dispositive and ordered a new trial based upon that ground. The defendant also raised an issue related to an irregularity that occurred before the grand jury. Defendant claimed that the trial justice should have dismissed the indictment based upon the irregularity. Recognizing that this issue would be raised anew on remand, this court discussed the grand jury issue in order to provide guidance to the trial justice. The State agrees with this court's general inclination not to decide issues that are not essential to disposition of the appeal. On the other hand, in cases such as *Heredia* and the instant case, the non-dispositive issues involve the validity of the indictment. The State respectfully suggests that when these issues have been comprehensively briefed and argued, the interests of justice weigh heavily in favor of treating the

issues on direct appeal. The State therefore urges this court to examine these issues and dispose of them at this stage of the proceeding.

*Conclusion*

For the foregoing reasons, the State urges the court to grant the Petition to Reargue the within appeal.

Respectfully submitted,

STATE OF RHODE ISLAND

ARLENE VIOLET
ATTORNEY GENERAL

/s/ THOMAS M. DICKINSON
Special Assistant Attorney General
Appellate Division
72 Pine St.
Providence, R.I. 02903
274-4400 ext. 291

CERTIFICATION

I hereby certify that on this 9th day of August, 1985, a true and accurate copy of the within MEMORANDUM was served upon DEFENDANT by mailing it to his attorney of record:

JOHN A. MAC FADYEN, III
91 Friendship St.
Providence, RI 02903

/s/ Geraldine A. Nanni

Supreme Court
No. 84-43-C.A.

State

v.

Luigi Manocchio

O R D E R

The petition to reargue is denied.

Entered as an Order of this Court this 19th day of September, 1985.

By Order,

/s/ Beverly A. Clark
Walter J. Kane
Clerk

BEVILACQUA, C.J. did not participate.

The Sixth Amendment to the United States Constitution provides:

> *Rights of the accused in criminal prosecutions.*—In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

The Fourteenth Amendment provides in pertinent part:

> *§ 1. Citizenship—Privileges and immunities—Due process—Equal protection of laws.*—All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article 1, Section 10 of the Rhode Island Constitution provides:

> *§ 10. Rights of the accused in criminal proceedings.*—In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury; to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining them in his favor, to have the assistance of counsel in his defense, and shall be at liberty to speak for himself; nor shall he be deprived of life, liberty, or property, unless by the judgment of his peers, or the law of the land.

Supreme Court, U.S.
FILED
DEC 17 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-875.

# In the
# Supreme Court of the United States.

OCTOBER TERM, 1985.

STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS,
PETITIONER,

*v.*

LUIGI MANOCCHIO,
RESPONDENT.

**Opposition to Petition for Writ of Certiorari to the Supreme Court of Rhode Island.**

JOHN A. MACFADYEN,
The Remington Building,
91 Friendship Street,
Providence, Rhode Island 02903.
(401) 521-4420
*Attorney for Respondent*

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

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22 pp

## Question Presented.

Whether this Court should review the decision of a state court of last resort reversing a conviction in a case turning on the credibility of one witness where the accused was erroneously precluded from cross-examining that one witness about mental problems effecting his recall of the events at issue and where that witness' credibility was already suspect given admitted multiple perjuries in prior trials, all of which led the state court to find "an obvious danger here that [the witness'] testimony involved far more recitation than recollection."

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3A Wigmore on Evidence, § 931, p. 758 (Chadbourn Revision, 1970) 8n

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No. 85-875.

# In the
# Supreme Court of the United States.

OCTOBER TERM, 1985.

STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS,
PETITIONER,

*v.*

LUIGI MANOCCHIO,
RESPONDENT.

**Opposition to Petition for Writ of Certiorari to the Supreme Court of Rhode Island.**

## Statement of the Case.

This case does not present the federal question framed by the State of Rhode Island in its Petition for Writ of Certiorari. Contrary to the state's contention, the Supreme Court of Rhode Island did not ground its decision in this case, and has not grounded its decisions in other cases, upon a "per se reversible error" doctrine which requires reversal of a conviction without

regard for whether the defendant was prejudiced by error (Pet. i).[1] Indeed the Rhode Island Court has found harmless error under the standard of *Chapman* v. *California*, 386 U.S. 18 (1967) or its state-law equivalent in several recent confrontation cases. *E.g.*, *State* v. *Soto*, 477 A.2d 945 (R.I. 1984); *State* v. *Anthony*, 422 A.2d 921 (R.I. 1980).

The phrase in the opinion below which belatedly[2] prompted this petition — "per se error" — is a red herring. This term, as used by the state supreme court, is simply a summary expression of the combined error and prejudice which necessarily ensues when "a trial justice *totally precludes* cross-examination by defense counsel of the *state's key witness* on the issues of motive or bias." *State* v. *Parillo*, 480 A.2d 1349, 1357 (R.I. 1984) (emphasis supplied). The phrase has not been applied outside these narrow parameters. In fact it has been employed only where, as here, the restriction on cross-examination occurred in an essentially one-witness case and effectively barred a classic avenue of impeachment. *See*, *State* v. *Parillo*, *supra*; *State* v. *Freeman*, 473 A.2d 1149 (R.I. 1984); *State* v. *DeBarros*, 441 A.2d 549 (R.I. 1982). Thus, by its definition and the very terms of its application, "per se error" as used by the Rhode Island Court involves a determination of prejudice more than sufficient to meet the *Chapman* test.

In the present case, the Rhode Island Court cited to *Parillo*, *Freeman*, and *DeBarros* for "guidance" (A. 8), but in fact and law founded its decision to reverse on a careful exposition of the plain, indeed blatant, prejudice which flowed from the

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[1] Respondent uses the following abbreviations throughout: "Pet." for the State's Petition for Writ of Certiorari; "A." for the State's Appendix to Petition for Writ of Certiorari; "Tr." for citations to the record below.

[2] The state did not voice its objections to Rhode Island's so-called "per se error" rule until its Petition for Reargument, filed after the decision was rendered below App. 11 *et. seq.* *See*, Part III *infra* arguing that the issue presented to this Court for review was not adequately raised below.

frustration of respondent's efforts to expose the defects in the memory of the only witness to adduce evidence against him.

This was a one-witness case. The state presented virtually all of its evidence of guilt through the mouth of one John "Red" Kelley, a notorious and self-proclaimed thief and high-jack artist. Halfway through trial the state revealed that Kelley had committed multiple perjuries[3] before the grand jury which had indicted respondent and in the three trials of co-defendants which preceded this one.[4] Then, in a mid-trial voir dire, Kelley broke down on the witness stand, admitting he was suffering from serious mental problems which were affecting his memory:

> Q. Mr. Leppo [defense counsel]: Are you suffering from any disease that affects your memory?
> A. Yes. Yes. [Witness starts to cry.]
> * * *
> Q. Would you tell us what disease you have that affects your mind and memory?
> A. I have — I'm, I'm being treated for many different things, and premature Alzheimer's, I think it is.
> Q. And does that affect your memory, sir?
> A. Yes, it does.
> Q. And does that affect your thought process?
> * * *
> A. It does.
> * * *
> Q. Has that affected your recall as to certain events?
> A. It does affect it, yes.

[3] The state's wilful failure to disclose the prior perjuries of its star witness until the fourth day of trial is the subject of a number of claims of error which were not reached by the Rhode Island Court.

[4] Kelly's testimony secured convictions only in the first of these trials. The next two juries which listened to him returned verdicts of acquittal.

Q. And how often does this happen?
A. When I tell you I can't remember a thing, its an honest answer.

(A. 3-4.)

Respondent sought a hearing on the witness' competency but was summarily denied (A. 4).[5] Extrinsic evidence of the witness' mental failings was impossible to obtain because Kelley had been a denizen of the witness protection program for some fifteen years. As the state supreme court recognized, "Manocchio's only hope for acquiring information about Kelley was through the use of cross-examination." (A. 6.) But trial counsel was permitted only four preliminary questions on the matter exposed at the voir dire before the trial court slammed the door on further cross-examination (A. 4-5, 8).

The Supreme Court of Rhode Island found that the questions which respondent was permitted to pose to the witness failed to give the jury an adequate basis for assessing the witness' credibility (A. 8). It then stressed that this was a one-witness case where "the jury's determination of whether or not to convict [respondent] rested *entirely* upon its assessment of Kelley's competency and veracity." (A. 9.) (Emphasis supplied.) And finally, it pointed out that this one witness was guilty, by his own admission, of multiple perjuries in prior proceedings. Thus the court concluded there was "an obvious danger here that Kelley's testimony involved far more recitation than recollection." (A. 9-10.)

These findings, not an abstract rule of law, were the basis of the Rhode Island Court's finding of "clear error, violating both Manocchio's Sixth Amendment right to confront the wit-

[5] This ruling is the subject of yet another claim of prejudicial error which was not reached by the court below.

nesses against him and Art. I, Sec. 10, of the Rhode Island Constitution." (A. 10.) This conclusion does not constitute an erroneous extension of the holding in *Davis* v. *Alaska*, 415 U.S. 308 (1974) as the state would have it (Pet. 7-8). To the absolute contrary, it is a wholly unremarkable application of confrontation principles to a demonstrably prejudicial denial of the respondent's right to a minimally adequate cross-examination of his only accuser.

## Argument.

### I. This Case does Not Present the Issue Framed by the Petition for Writ of Certiorari.

#### A. *Introduction.*

The State of Rhode Island has attempted to place this case upon a procrustean bed of reversible error without regard for prejudice. It cannot be made to fit.

Prejudice is an integral part of "per se error" as that term is used by the Supreme Court of Rhode Island. It is simply a shorthand way of stating the obvious: that certain restrictions on cross-examination are so devastating to the truth-seeking process as to plainly require a new trial. Every case to use the phrase "per se error" anchors its reasoning in the critical importance of the witness being examined and the significance of the impeachment which was frustrated by the trial court. No Rhode Island case has found reversible error in the absence of a showing of prejudice.

The present case is no exception. The decision below cites two prior so-called "per se error" cases for "guidance," but its

ultimate conclusion to reverse is squarely based on the patent prejudice suffered by respondent when the trial court foreclosed all inquiry into Kelley's admitted problems with his memory.

The state has confused a form of words for a substantive issue. This Court, however, "reviews judgments, not statements in opinions." *Black* v. *Cutter Laboratories*, 351 U.S. 292, 297-298 (1956). The petition should be denied.

### B. *The Supreme Court of Rhode Island Found Prejudicial Error in This Case.*

This case shrieks of prejudicial error. The state's sole witness, an admitted thief and perjuror, testified under oath in a voir dire that he had "problems" with his memory and that he was "being treated for many different things, and premature Alzheimer's, . . ." (A. 3). Yet when he went before the jury, he testified in nearly seamless detail to a complex criminal conspiracy occurring more than fifteen years earlier. Cross-examination about his earlier admissions was stopped in its tracks.

The Rhode Island Court began its analysis of respondent's claim of error by reciting the holdings in its recent cases of *Anthony*, *DeBarros*, *Freeman* and *Parillo*. While noting that these cases established a "per se error" rule (A. 7), the court stressed that they involved plainly erroneous restrictions on the cross-examination of *e.g.*, "the *only eyewitness* to the victim's murder" (A. 7, discussing *State* v. *Freeman*, *supra*) (emphasis supplied), and "the *sole living eyewitness* to the victims' murders." (A. 8, discussing *State* v. *Parillo*, *supra*) (emphasis supplied).

The Rhode Island Court characterized its citation to these cases as being "for guidance" (A. 8). It then embarked on a careful exegesis of the prejudice stemming from the limitation of cross-examination at the trial below.

First, the Rhode Island Court found that the questions which defense counsel was permitted to ask did not sufficiently apprise the jury of Kelley's memory problems (A. 8). The state now disputes this conclusion, asserting that the court ignored numerous instances at trial where Kelley admitted failures of memory (Pet. 4, 10). This complaint is somewhat audacious given the fact that the state's brief below never identified these "repeated assertions of absence of memory." (Pet. 4.)[6] But more to the point, it is simply incorrect. The truth is that Kelley exhibited before the jury a singularly good memory for events occurring nearly fifteen years prior to his testimony.[7] He was a consumate witness, whose "failures of recollection" came largely when defense counsel was endeavoring to pin him down on specific dates in an ultimately futile effort to set up a partial alibi. *E.g.*, Tr. 1322-1329.

Kelley's lack of memory on these particular points is in marked contrast to the detail of the rest of his testimony, fostering the suspicion that these uniquely convenient memory lapses might have been more tactical than real. In any event, far from assisting the defense as the state suggests, most of these admissions not only appeared normal, given the fifteen-year time lag, but permitted the state to finesse the alibi defense which had so undermined Kelley's credibility in prior trials.

In short, not only is there no indication that the Supreme Court of Rhode Island failed to determine the adequacy of the defense opportunity to test Kelley's memory, but the record plainly shows that the jury in fact received a wholly false picture of the only significant witness in the case.

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[6] *See*, Part III *infra* claiming that the state failed to raise properly below the issue which it now seeks to bring before this Court.

[7] Respondent apologizes for this blanket assertion of fact but he knows of no other way, short of delivering the transcript, to rebut the state's wholly inaccurate characterization of Kelley's testimony in this case.

The Rhode Island Court then went on to find that questions exploring memory problems were proper, indeed critical cross-examination in light of Kelley's voir dire admissions.

> Where counsel is able to demonstrate that through either passage of time or an intervening mental disease the witness is incapable of recollecting the events in question, or of distinguishing fact from fiction, the most essential element of the witness' value and reliability has been destroyed.

(A. 9.) This conclusion is plainly correct.[8] Indeed the state does not appear to dispute it. Instead, the petition suggests that respondent's cross-examination sought inadmissible medical conclusions from the witness (Pet. 10-11). Not only is this

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[8] Commentators state without exception that evidence of memory impairment is admissible to impeach a witness' credibility. Thus *Wigmore* notes that "any defect of capacity . . . involving less than the normal testimonial capacity, should legitimately discredit the witness, carrying whatever weight it may have in a given case, . . .", 3A Wigmore on Evidence, § 931, p. 758 (Chadbourn Revision, 1970); and hence that "(a)n impairment of memory caused by disease or by old age or idiocy . . . should be admissible." *Id.* at § 934, p. 766 (footnote and emphasis omitted). *Underhill* flatly states that "any evidence which tends to show that the witness' mind or memory is impaired or feeble is admissible to discredit him, and this is true though the court has ruled that the witness is competent to testify." 1 Underhill's Criminal Evidence, § 235, p. 711 (6th ed. 1973). Tracy notes that "evidence may be received of any disclosed impairment of the mental powers of the witness from the use of drugs, from disease, from senility, or from nymphomania." Tracy, Handbook of the Law of Evidence, p. 189 (N.J. 1952). American Jurisprudence is the same: "questions on evidence tending to show that the mind and memory of the witness are impaired by disease or otherwise, or are in a feeble condition, are competent to discredit the testimony." 81 Am.Jur. 2d, Witnesses, § 540, p. 541 (1976) (note omitted); *accord*, 98 C.J.S., Witnesses, § 461, pp. 326-327 (1983) ("it may be shown that the witness has a mind or memory impaired from disease or other cause; . . .").

incorrect," but it is wholly a matter of state law which was definitively decided against the state below.

In the final part of its opinion, the Rhode Island Court squarely addressed the question of prejudice: "[i]n the case presently before us, an exploration of Kelley's possible memory defects was especially warranted." (A. 9.) It noted that Kelley "was the only witness who could link Manocchio with the fifteen-year old murders. . .", and hence "the jury's determination of whether or not to convict him rested entirely upon its assessment of Kelley's competency and veracity." (A. 9.) Finally, it observed that Kelley was testifying for the fourth time, "all of his prior testimony (having been) tainted in significant respects with perjury." (A. 9.) Based on these factors the court found that "(t)here was an obvious danger here that Kelley's testimony involved far more recitation that recollection." (A. 10.) The conclusion followed immediately:

> *For these reasons* we find in line with our prior case law that the trial justice's limitation of cross-examination on the issue of Kelley's memory deficiencies and mental diseases was clear error, violating both Manocchio's Sixth Amendment right to confront the witnesses against him and Art. I, Sec. 10, of the Rhode Island Constitution.

*Id.* (emphasis supplied).

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"The defense was not seeking inadmissible expert testimony from a lay witness about a medical diagnosis. Instead the defense sought the facts underlying the medical conclusion. Kelley was fully competent to describe his memory problems, to detail his symptoms, and to testify that he was being treated by a doctor. This testimony would have been both admissible and highly relevant to an assessment of the witness' credibility. It could have been devastating if Kelley admitted he was having problems distinguishing fact from fiction or that he believed things to have happened that he later found to be figments of his imagination.

Notwithstanding the Rhode Island Court's citation to its "per se error" cases "for guidance," in this case it found palpable prejudice on the record before it.

### C. *The Supreme Court has Not Adopted a Rule of Per Se Reversible Error Which Excludes Consideration of Prejudice.*

Every Rhode Island case to use the phrase "per se error" has stressed that the confrontation question at issue 1) involved cross-examination of a critical state's witness, usually the sole eyewitness to the offense; and 2) that the restriction on cross-examination was so extreme as to totally or virtually bar a plainly significant line of impeachment. In *Parillo* the Rhode Island Court defined its rule as follows: "we have adopted a per se error rule in reviewing cases in which a trial justice totally precludes cross-examination by defense counsel of the state's key witness on the issues of motive or bias." *State* v. *Parillo, supra* at 1357. Similarly, in *State* v. *Freeman, supra* at 1154 the court stressed that "because . . . [the sole eyewitness'] credibility was the vital element in establishing the defendant's guilt, the trial justice, by totally precluding the defendant from raising and probing the issues of motive, bias, or prejudice, effectively cut off the defendant's right to test . . . [the sole eyewitness'] credibility fully and adequately." *DeBarros* is the same: "(i)n that case [*DeBarros*] the defendant was totally precluded from cross-examining a crucial witness in respect to the issue of bias." *State* v. *Freeman, supra*. Repeatedly these cases emphasize that they involve impeachment of "the sole eyewitness to the events immediately preceding . . . [the victim's] death" whose credibility is the "pivotal element" in the state's case. *State* v. *Freeman, supra* at 1153; *accord, State* v. *Parillo, supra* at 1357-1358.

The proof of the limited extent of this "rule" lies in the cases where it was not applied. Thus, in *State* v. *Soto*, 477 A.2d 945 (R.I. 1984), the Rhode Island Court found an erroneous limitation of cross-examination to be "rendered harmless, . . . by virtue of the full cross-examination ultimately permitted on this issue." *See also*, *State* v. *Anthony*, 422 A.2d 921, 925 (R.I. 1980) (finding harmless a restriction on the cross-examination where witness adequately impeached as to bias). Indeed the court has repeatedly stated that where cross-examination in a particular key area is not completely, or nearly completely foreclosed, it would apply a classic harmless error analysis. *E.g.*, *State* v. *Parillo*, *supra* at 1358 n.5; *State* v. *DeBarros*, *supra* at 552.

Rhode Island has made prejudice an intrinsic part of the determination of error in those situations where, because of the extreme nature of the limitation on cross-examination, a separately-defined assessment of prejudice would be unnecessary. In the present case the trial court virtually precluded cross-examination of the state's only significant witness in an area universally recognized to be highly relevant to credibility. To the degree the Supreme Court of Rhode Island actually employed a so-called "per se error" rule — and respondent contends that the decision below was grounded on a finding of actual prejudice — its holding was fully consistent with *Davis* v. *Alaska*, 415 U.S. 308 (1974) and other cases from this Court construing the Sixth Amendment to the United States Constitution.

## II. This Case will Not be Controlled by a Decision in *Delaware* v. *Van Arsdall*, No. 84-1279 and Should Not be Held in Abeyance Pending Decision in that Case.

In *Delaware* v. *Van Arsdall*, No. 84-1279, this Court will consider the question of whether an erroneous restriction of

cross-examination requires automatic reversal without reference to whether the defendant was actually prejudiced by the error. As demonstrated above, this case does not involve this issue. Rhode Island's use of the term "per se error" necessarily includes an assessment of prejudice; and in the present case the Rhode Island Court fully demonstrated the prejudice flowing from the erroneous restriction of cross-examination at issue here. *Van Arsdall* will not control the decision in this case and provides no reason to grant certiorari to review a confrontation case which is remarkable only for the extreme prejudice resulting from the trial error.

## III. The Decision of the Supreme Court of Rhode Island Rests Upon Independent and Adequate State Law Grounds.

### A. *The Issue Presented by the Petition for Certiorari was Not Adequately Raised Below.*

The state filed a sixty-two (62) page brief in the Supreme Court of Rhode Island but it never made any specific claim that the restriction of cross-examination was harmless error in light of other particular instances where Kelley's memory was shown to be deficient. Instead it argued that the trial court did not abuse its discretion to limit cross-examination. *See, State's Brief*, p. 20-25. At oral argument the state invited the court to "undertake a careful reading of the transcript in this case" (A. 14), asserting without particularization that the review would show numerous instances in which Kelley admitted his inability to remember specific details.[10] But it was not until

[10] As noted *infra*, these instances were neither particularly numerous nor surprising in light of the fifteen-year delay between the commission of the

its petition for reargument that the state finally challenged the so-called "per se error" rule and cited to specific portions of the transcript in support of the contentions it now makes (A. 11 *et seq.*).[11]

There is no way of knowing whether the Rhode Island Court took the state up on its oral invitation to read the nearly two thousand (2,000) page transcript in this case. But the opinion below certainly suggests that it carefully reviewed Kelley's cross-examination enroute to its finding of patent error in the limitation of cross-examination. What is clear is that the Supreme Court of Rhode Island has a long-standing rule of practice that it will discount arguments which do not contain adequate supporting authority. *E.g.*, *Berberian* v. *New England Tel. & Tel. Co.*, 117 R.I. 629, 369 A.2d 1109 (1977); *Mercurio* v. *Fascitelli*, 116 R.I. 237, 354 A.2d 736 (1976); *Walmac Co.* v. *Zurich Ins. Co.*, 114 R.I. 410, 333 A.2d 686 (1975). Moreover the court will not be obligated to consider record evidence when a party fails to specify where in the transcript it can be found. *Wayne Distributing Co.* v. *Schweppes U.S.A. Ltd.*, 116 R.I. 108, 352 A.2d 625 (1976).

The state failed to comply with these procedural rules when it neither challenged the "per se error" rule prior to decision nor cited to specific transcript pages in support of its contentions. This failure alone warrants denial of the petition. *See*, *Henry* v. *Mississippi*, 379 U.S. 443 (1965); *cf.*, *Hansen* v.

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offense and the trial of this matter. Under the circumstances, Kelley's testimony was remarkably detailed, so detailed in fact that as the Rhode Island Court remarked, one might fear that it "involved far more recitation than recollection." (A. 10.)

[11] The state can hardly claim surprise at the citation in the opinion below to Rhode Island's "per se error" decisions. These decisions, and *State* v. *Parillo*, *supra* in particular, were discussed at length in the briefs submitted to the Supreme Court of Rhode Island. As noted *infra*, however, the discussions focused on the issue of whether cross-examination was unduly restricted and not on the appropriate test for reversible error.

*Denckla*, 357 U.S. 235 (1958) (Court may refuse to entertain federal questions raised for first time on petition for rehearing).

B. *The State Court Decision was Based on Art. I, Section 10 of the Rhode Island Constitution as an Alternative Ground of Decision.*

A state may afford its citizens greater protection under state constitutional provisions than this Court has determined must be provided under federal constitutional provisions. Indeed, "'[i]t is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions.'" *Michigan* v. *Long*, 463 U.S. 1032, 1041 (1983) (quoting from *Minnesota* v. *National Tea Co.*, 309 U.S. 551 (1940)). *See also, Oregon* v. *Hass*, 420 U.S. 714, 719 (1975). As Justice Stevens noted in his concurrence in *Massachusetts* v. *Upton*, 466 U.S. 727, ___, 104 S.Ct. 2085, 2091 (1984), "[t]he states in our federal system, however, remain the primary guardian of the liberty of the people."

Consonant with these principles, this Court has long held that it cannot reach out to address federal questions raised in a state court decision where an independent and adequate basis for that decision is founded in the state court's interpretation and application of state constitutional and statutory provisions. Reaching out in such circumstances results only in impermissible advisory opinions and denigrates the integrity of the state judiciaries. *See, e.g., Herb* v. *Pitcairn*, 324 U.S. 117 (1945); *Fox Film Corp.* v. *Muller*, 296 U.S. 207 (1935).

In the present case the Supreme Court of Rhode Island explicitly based its decision on Art. I, § 10 of the Rhode Island Constitution as well as the Sixth Amendment. While it did not fit its decision formalistically to the standards of *Michigan* v. *Long, supra*, it twice stressed that its decision rested on state as well as federal grounds (A. 6, 10).

The Rhode Island Court decided this matter citing primarily to its own cases. Contrary to the suggestion in the state's petition (Pet. 6, n.2), the state and federal confrontation provisions, while textually similar, are not identical in content. Indeed Rhode Island's seminal cross-examination case, *State* v. *Myers*, 115 R.I. 583, 350 A.2d 611 (1976), was explicitly decided on the basis of the Rhode Island guarantee in preference to a claim of federal constitutional error. Since *Myers*, Rhode Island has continued to employ Art. I, § 10 in its confrontation decisions as an alternative ground of decision. *E.g.*, *State* v. *Parillo*, *supra*; *State* v. *Freeman*, *supra*; *State* v. *Anthony*, *supra*.

In light of this history, this Court should not conclude that "the State Court decided [this] case the way it did because it believed that federal law required it to do so." *Michigan* v. *Long*, *supra*. Instead it should refrain from reaching out for a federal question and deny the Petition for Writ of Certiorari.

**Conclusion.**

The decision of the Supreme Court of Rhode Island does not present the issue framed by the Petition for Writ of Certiorari, is correct as a matter of fact and law, presents no significant federal question for this Court to review, is based on independent and adequate state grounds, and should be deemed final under principles of federalism, constitutional restraint, and simple fairness. Accordingly, respondent respectfully requests this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

JOHN A. MACFADYEN,
The Remington Building,
91 Friendship Street,
Providence, Rhode Island 02903.
(401) 521-4420

Supreme Court, U.S.
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(3)

No. 85-875

In The
# Supreme Court of the United States
October Term, 1985

STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS,

*Petitioner,*

vs.

LUIGI MANOCCHIO,

*Respondent.*

**On Petition for Writ of Certiorari to the Supreme Court of Rhode Island**

## SUPPLEMENTAL BRIEF OF THE PETITIONER

ARLENE VIOLET
*Attorney General of the State of Rhode Island*

THOMAS MORE DICKINSON
*Counsel of Record*
Special Assistant Attorney General
Chief, Appellate Division
72 Pine St.
Providence, RI 02903
(401) 274-4400 ext. 290

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

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RULE CITED:

Supreme Court Rule 22.6 ..... 1

No. 85-875

—o—

In The
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October Term, 1985

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STATE OF RHODE ISLAND AND
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vs.

LUIGI MANOCCHIO,

*Respondent.*

—o—

**On Petition for Writ of Certiorari to the Supreme Court of Rhode Island**

—o—

## SUPPLEMENTAL BRIEF OF THE PETITIONER

—o—

Now comes the State of Rhode Island and Providence Plantations, Petitioner herein, by its attorney, and files the within supplemental brief for purposes of addressing a recent decision of this Honorable Court. This supplemental brief is filed pursuant to Rule 22.6.

**WHETHER THE DECISION OF THE RHODE ISLAND SUPREME COURT RESTED ON AN ADEQUATE STATE LAW BASIS?**

Petitioner files the instant memorandum for the purpose of directing this Court's attention to the recently-decided case of *New York v. Class*, No. 84-1181, 54 U.S. L.W. 4178 (U.S., Feb. 25, 1986). Before addressing the *Class* case, a brief summary of the instant case is in order.

This case is before the Court on a Petition for Certiorari filed by the State of Rhode Island and Providence Plantations. The Supreme Court of Rhode Island reversed the conviction of Respondent Luigi Manocchio (Pet. App. 1 to 10), holding that limitation of cross-examination constituted *per se* reversible error under the rule of *Davis v. Alaska*, 415 U.S. 308 (1974). (Pet. App. at 7 (applying *per se* reversal rule)) The Petitioner submits that this was an erroneous decision.

Petitioner contends that, instead of applying a rule of *per se* reversal, the Rhode Island Supreme Court should have conducted a thoroughgoing analysis of the trial evidence to determine whether the limits placed upon cross-examination resulted in actual trial prejudice to the defendant.[1] In opposing certiorari in this case, Respondent Manocchio has argued *inter alia* that the Rhode Island Su-

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1 Petitioner has addressed this Court's attention to the pending case of *Delaware v. van Arsdall*, No. 84-1279, argued Jan. 22, 1986, and has suggested that the issue presented herein is likely to be controlled by the outcome of the *van Arsdall* decision. Accordingly, Petitioner has moved to defer disposition of the instant petition until such time as the Court renders its decision in *van Arsdall*. To date, this Court has not yet ruled on the Petitioner's motion to defer.

preme Court's *per se* rule of reversal rests upon an adequate state law basis. Petitioner disputes this contention and suggests that this Court's decision in *Class, supra,* disposes of Respondent's argument.

In *Class,* this Court clearly held that in order to constitute an adequate state law ground, the state court decision must contain within it a "requisite 'plain statement' that it rests on state grounds." *New York v. Class,* slip op. 54 U.S.L.W. at 4179 (quoting *Michigan v. Long,* 463 U.S. 1032, 1042, 1044 (1983)). In the instant case, Respondent Manocchio concedes that the decision of the Rhode Island Supreme Court lacked such a statement. (Resp. Opp. at 14 (conceding that R.I. opinion fails to comply with requisites of *Michigan v. Long, supra*)) Indeed, an examination of the Rhode Island court's opinion clearly demonstrates that the court cited both state and federal cases in support of the *per se* reversal rule. (Pet. App. 6 to 8) Thus the lower court decision in this case is extremely similar to the New York decision reviewed by this Court in *Class.* The *per se* reversal rule invoked by the state court in the instant case had as its purported source the decision of this Court in *Davis v. Alaska, supra.* Contrary to Respondent Manocchio's assertion, there is no adequate state law basis for the Rhode Island Supreme Court's judgment. Because the Rhode Island court's decision rests primarily upon federal law, its judgment is open to a full review by this Court on certiorari.

———o———

## CONCLUSION

For the foregoing reasons and for the reasons stated in the Petition for Certiorari, this Court should grant a writ of certiorari to review the judgment of the Rhode Island Supreme Court.

Respectfully submitted,

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS,

By Its Attorneys,

ARLENE VIOLET
ATTORNEY GENERAL

THOMAS MORE DICKINSON
*Counsel of Record*
Special Assistant Attorney General
Chief, Appellate Division
72 Pine St.
Providence, RI 02903
(401) 274-4400 ext. 290

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No. 85-875

In The
# Supreme Court of the United States
October Term, 1985

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS,

*Petitioner,*

vs.

LUIGI MANOCCHIO,

*Respondent.*

**On Petition for Writ of Certiorari to the Supreme Court of Rhode Island**

## SECOND SUPPLEMENTAL BRIEF OF THE PETITIONER

ARLENE VIOLET
*Attorney General of the State of Rhode Island*

THOMAS MORE DICKINSON
*Counsel of Record*
Special Assistant Attorney General
Chief, Appellate Division
72 Pine St.
Providence, RI 02903
(401) 274-4400 ext. 290

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

## QUESTION PRESENTED

WHETHER THE JUDGMENT OF THE RHODE ISLAND SUPREME COURT SHOULD BE REVERSED AND THE CASE REMANDED FOR RECONSIDERATION IN LIGHT OF THIS COURT'S DECISION IN *Delaware v. van Arsdall* No. 84-1279, slip op. (April 7, 1986)?

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Now comes the State of Rhode Island and Providence Plantations, Petitioner herein, by its attorney, and files the within supplemental brief for the purpose of addressing a recent decision of this Honorable Court. This supplemental brief is filed pursuant to Rule 22.6.

———o———

## PROCEDURAL BACKGROUND

The instant Petition for Certiorari was docketed on November 15, 1986. The Petition addressed to this Court's attention the following question:

### QUESTION PRESENTED FOR REVIEW

> Whether the Rhode Island Supreme Court erred in holding that limitation of cross-examination regarding one aspect of the memory and perception of the prosecution's chief witness constituted *per se* reversible error pursuant to this Court's decision in *Davis v. Alaska*, 415 U.S. 308 (1974)?

Pet. for Cert. i. In discussing the merits of this issue, Petitioner suggested that the instant case raised precisely the same issue that would be before the court in *Delaware v. van Arsdall*, No. 84-1279 (U.S. cert. granted July 2, 1985). Thereafter, on December 18, 1985, the Petitioner filed a motion to defer disposition of the instant Petition until such time as this Court rendered a decision in the *van Arsdall* case. The *van Arsdall* case was decided on April 7, 1986, and the instant Petition is therefore ripe

for disposition. The within supplemental brief discusses the instant case in light of *van Arsdall.*

**WHETHER THE JUDGMENT OF THE RHODE ISLAND SUPREME COURT SHOULD BE REVERSED AND THE CASE REMANDED FOR RECONSIDERATION IN LIGHT OF THIS COURT'S DECISION IN Delaware v. van Arsdall No. 84-1279, slip op. (April 7, 1986)?**

The instant case involves the question whether the trial justice properly limited the defendant's cross-examination of the prosecution's chief witness. In reversing defendant's conviction, the Rhode Island Supreme Court reasoned that this Court's decision in *Davis v. Alaska,* 415 U.S. 308 (1974), imposed a rule of automatic reversal when a trial judge limits the ability of the defendant to cross-examine a prosecution witness. The Rhode Island court described the scope of its *per se* error rule as follows:

> [W]e clearly established a per se error rule where the defendant has been fully precluded from effective cross-examination on a pertinent issue. We have also relied on the per se standard where a defendant has been permitted to ask preliminary questions but has been otherwise functionally precluded from constitutionally adequate cross-examination.

Pet. app. 7 (citations omitted).

The Rhode Island Supreme Court based its per se reversal rule upon this Court's decision in *Davis, supra.* In seeking certiorari, Petitioner herein disputed the validity of the *per se* rule and suggested that the Rhode Island Supreme Court was misreading this Court's decision in *Davis:*

> The Petitioner submits that the *per se* error doctrine constitutes an erroneous extension of this Court's decision in *Davis*. Confrontation and cross-examination are important rights. Nevertheless, Petitioner submits that even in situations where a trial judge has imposed limitations upon cross-examination a proper interpretation of the Sixth Amendment requires analysis of the totality of the circumstances to determine whether the defendant received a constitutionally fair trial.

Pet. for Cert. 7-8. The decision of this Court in *van Arsdall* clarifies the rule of *Davis* and reveals that the Rhode Island Supreme Court erred when it applied a per se reversal rule in the instant case.

First, this court in *van Arsdall* noted that, the Confrontation Clause notwithstanding, a trial judge retains significant discretion in defining the scope of cross-examination:

> It does not follow, of course, that the Confrontation Clause of the Sixth Amendment prevents a trial judge from imposing any limits on defense counsel's inquiry into the potential bias of a prosecution witness. On the contrary, trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant. And as we observed earlier this Term, "the Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware v. Fensterer*, 474 U.S. — (1985) (per curiam).

*Delaware v. van Arsdall*, slip op. In the instant case the State's chief witness testified prior to trial that he was

suffering from premature Alzheimer's disease. Defense counsel at trial attempted to bring this matter before the jury by cross-examining the witness with regard to the Alzheimer diagnosis. Defendant claimed on appeal that foreclosing this avenue of cross-examination effectively precluded the defense from revealing to the jury the alleged impact of Alzheimer's disease upon the memory of the individual who is suffering from the disease. The State contended that the limitation of cross-examination was harmless for two reasons. First, a review of the trial transcript revealed that the witness openly displayed his memory lapse to the jury. He responded to literally dozens of questions by stating that he had no memory or that his recollection was faulty. Thus, it was readily apparent to the jury—and to anyone else who examined the trial transcript in its totality—that the witness was suffering from a memory problem. The defendant was, in essence, merely attempting to establish Alzheimer's disease as the causal basis for the memory lapse. Because the substantive memory problem was manifest, the nature of the memory problem was, in the words of the *van Arsdall* Court, only "marginally relevant."

Moreover, under Rhode Island law, this witness would certainly not have been qualified to testify in any detail with regard to the nature and effect of Alzheimer's disease. Under ordinary evidentiary principles it would have been erroneous to permit this lay witness to testify about the nature and cause of a disease. *E.g., State v. Adams*, 481 A.2d 718 (R.I. 1984); *State v. Bowden*, 473 A.2d 275 (R.I. 1984). At most he could have recounted the fact that he was suffering from some memory losses. Yet this information was clearly before the jury in the form of

numerous failures of recollection in response to specific questions.

Because the witness' memory loss was obvious to the jury, there was scant possibility of prejudice as a result of the limitation of cross-examination. The Petitioner submits that it was incumbent upon the Rhode Island Supreme Court to undertake a harmlessness analysis. The court should have focussed upon the testimony of the witness in its entirety. The excluded evidence should then have been examined to determine whether its omission resulted in prejudice to the defendant. If the material excluded was marginal or merely cumulative, reversal of defendant's conviction is inappropriate:

> The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt. Whether such error is harmless in a particular case depends upon a host of factors, all readily accessible to reviewing courts. These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.

*Delaware v. van Arsdall, slip op.*

In the instant case the Rhode Island Supreme Court declined to undertake such an inquiry, choosing instead to apply the *per se* rule of reversal. This Court in *van Arsdall* clearly found error in the application of a *per se* reversal rule. Under the law as enunciated in *van Arsdall*,

the Rhode Island Supreme Court has erred and its decision must be reversed.

———o———

## CONCLUSION

For the foregoing reasons, and for such additional reasons as appear in the Petition for Certiorari and in the Petitioner's previous Supplemental Brief, the judgment of the Rhode Island Supreme Court should be vacated and the case remanded for reconsideration in light of *Delaware v. van Arsdall,* No. 84-1279, slip op. (Apr. 7, 1986).

Respectfully submitted,

STATE OF RHODE ISLAND
AND PROVIDENCE
PLANTATIONS,

By its Attorney,

ARLENE VIOLET
*Attorney General of the*
*State of Rhode Island*

THOMAS MORE DICKINSON
*Counsel of Record*
Special Assistant Attorney General
Chief, Appellate Division
72 Pine St.
Providence, RI 02903
(401) 274-4400 ext. 290